89-1948

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1990

ENCORE ASSOCIATES, INC., EUGENE P. WEISMAN and JANE E. WEISMAN,

Petitioners,

-vs-

WILLARD C. SHINER and RUTH M. SHINER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Pennsylvania procedures governing confession of judgment violate the Petitioners' rights to due process of law?

2. Did the Courts further violate Petitioners' rights to due process, by imposing counsel fees against them for filing an appeal from the lower court's refusal to strike the judgment?

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PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption of the within Petition for Writ of Certiorari. The Petitioner, Encore Associates, Inc., has no parent or subsidiary companies to be listed in accordance with Rule 29.1.

OPINIONS DELIVERED IN THE COURTS BELOW

The Memorandum Opinion of the Superior Court of Pennsylvania, entered on October 28, 1988, has not been reported but appears in the Appendix at 2a-31a.

The Opinion of the Honorable Eugene B. Strassburger, III of the Court of Common Pleas of Allegheny County, entered on October 15,

1987, has not been reported but appears in the Appendix at 32a-41a.

The Opinion of the Honorable I. Martin Wekselman of the Court of Common Pleas of Allegheny County, entered on October 30, 1987, has not been reported but appears in the Appendix at 42a-45a.

The Opinion of the Honorable Ralph H. Smith, Jr. of the Court of Common Pleas of Allegheny County, entered on December 15, 1987, has not been reported but appears in the Appendix at 46a-52a.

STATEMENT OF JURISDICTION

Petitioners seek review of the Orders of the Supreme Court of Pennsylvania, entered on March 12, 1990, denying their Petitions for Allowance of Appeal.

This Honorable Court has jurisdiction to review such Orders by writ of certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Resolution of the within matter involves Section 1 of the Fourteenth Amendment to the Constitution, which provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In October of 1981, Eugene P. Weisman and his wife, Jane E. Weisman (WEISMANS), two of the Petitioners herein, agreed to purchase fifty (50%) percent of the stock of Encore, Inc. from the Respondents, Willard C. Shiner and Ruth M. Shiner (SHINERS), for the sum of $50,000.00. Encore, Inc. was a Pennsylvania Corporation, which operated a bar and restaurant located in the Shadyside area of the City of Pittsburgh, using a storeroom owned by the SHINERS. Prior to the agreement, Mr. Weisman and Mr. Shiner had been friends and had been involved in numerous business dealings together.

The purchase of the Encore, Inc. stock was conditioned upon the expansion of the business by the addition of two adjacent storerooms owned by the SHINERS, and the

obtainment of a loan of $600,000.00 from the Allegheny County Industrial Development Authority ("IDA"), to pay for the expansion and renovation.

An application for IDA funding was made in October of 1981, and funding in the amount of $600,000.00 was approved on April 30, 1982. The business was expanded as contemplated, at a cost of $750,000.00, with WEISMAN and SHINER each providing $75,000.00 in additional funds to pay the costs. Substantial improvements were made to the property. The room was expanded, a roof put on, the heating system was improved, and new air conditioning, plumbing and a new electrical system were installed.

The stock purchase agreement was prepared by Leonard Mendelson, Esquire, a Pittsburgh attorney who is Ruth Shiner's brother. Mr.

Mendelson, and his law firm, Hollinshead & Mendelson, also represented all of the parties in their efforts to secure the IDA financing.

In October of 1981, WEISMAN and SHINER orally agreed upon a fifteen year lease for the property, to coincide with the term of repayment for the IDA loan. Approximately one year later, the parties executed a written lease which was prepared by Leonard Mendelson, Esquire. The lease was then backdated. The written lease provided for a term of five years, with two options to renew for a period of five years each.

In April of 1982, WEISMAN and SHINER formed a new corporation known as Encore Associates, Inc.. Encore, Inc. was merged into the new corporation. Hollinshead & Mendelson represented both the WEISMANS and the SHINERS in the transaction.

In January of 1985, SHINER, who had been ill, requested that WEISMAN buy out his interest in Encore Associates, Inc.. At the SHINERS' request, the WEISMANS purchased the SHINERS' interest for the sum of $105,000.00, and agreed to indemnify the SHINERS on the IDA loan, which had been personally guaranteed by both the WEISMANS and the SHINERS. This purchase was made with the understanding that the lease would remain in effect for 15 years, so that profits from the business could be used to pay off the IDA loan. Like many of their transactions, this purchase was handled rather informally. SHINER and WEISMAN agreed upon the terms, and Hollinshead & Mendelson prepared the agreement and mailed it to the parties to arrange their own closing.

During this period, Hollinshead & Mendelson remained general counsel for the Weisman-

owned Encore Associates, Inc., and retained the corporate records until June 5, 1987, after the present dispute arose. WEISMAN believed that as owners of Encore Associates, Inc., he and his wife were represented by Hollinshead & Mendelson. In addition to his familial ties to Mrs. Shiner, Leonard Mendelson was an investor in several ventures with WEISMAN and SHINER.

Early in 1987, Steven A. Stepanian, an attorney for Michael Haggerty (the manager of the business, who was negotiating to purchase the business), told WEISMAN to exercise his option to renew the lease. WEISMAN replied that formal renewal was unnecessary, as he had always operated under the assumption that formal renewal was unnecessary, and had never been advised otherwise by either SHINER, who was in the offices of Encore Associates, Inc. on a daily basis, or Hollinshead & Mendelson,

his general counsel. Mr. Stepanian replied that he would formally exercise the option on behalf of the prospective purchaser.

Mr. Stepanian prepared a notice to exercise the option and sent it to Mr. Haggerty to forward to the SHINERS. However, Mr. Haggerty, through inadvertence,[1] failed to send the notice to the SHINERS until April 21, 1987. Pursuant to the written lease, written notice of the exercise of the option was due on or before March 31, 1987. On April 22, 1987, the SHINERS notified the WEISMANS of their refusal to honor the renewal of the lease. As of this time, the WEISMANS had made

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[1]Mr. Haggerty testified that when he received a form letter for exercise of the option and a cover letter from Mr. Stepanian, he was in a hurry to leave his home. He noted the word "copy" in the cover letter and assumed the form letter to be a copy of the notice sent to the SHINERS. On April 21, 1987, after speaking to Mr. Stepanian, Mr. Haggerty immediately sent the letter to the SHINERS.

in excess of $400,000.00 in improvements to the property, had paid the SHINERS $155,000.00 for their interest in the business, and were personally obligated to pay in excess of $300,000.00 remaining on the IDA loan.

Upon the SHINERS' refusal to honor the lease renewal, Petitioners commenced an Action in Equity against the SHINERS, in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. GD87-13537. In their Equity Action, Petitioners sought to preliminarily enjoin the SHINERS from evicting them from the premises. The Motion for Preliminary Injunction asserted that as the result of the course of dealing between the parties, it was not necessary for Petitioners to formally exercise their option to renew the lease. In the alternative, Petitioners contended that the court, sitting in equity, could excuse the

late exercise of the option to renew. Following a half-day hearing, the Honorable Eugene B. Strassburger, III denied the Motion for Preliminary Injunction. In support of his decision, Judge Strassburger determined that Petitioners had failed to establish irreparable harm or a clear right to relief, both of which are prerequisites to the issuance of a preliminary injunction under Pennsylvania law. Petitioners filed an appeal from Judge Strassburger's decision to the Superior Court of Pennsylvania, which was docketed at No. 1411 PGH 1987.

Following the denial of the preliminary injunction, the Respondents confessed judgment against the Petitioners for possession of the premises. The Complaint in Confession of Judgment was filed in the Court of Common Pleas of Allegheny County at No. GD87-17492, and was purportedly based upon a warrant of

attorney contained in the written lease between the parties. Petitioners filed a Petition for Rule to Show Cause Why the Judgment Should Not Be Opened, asserting that:

> A. The parties, through their actions, had modified the terms of the lease so that written notice of the exercise of the option was not necessary;
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> B. Both parties were represented by the same attorneys, Leonard Mendelson and Hollinshead & Mendelson, and that as a result of such dual representation, Petitioners were "lulled into a reasonable belief that strict compliance for the exercise of the option would not be required";
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> C. Respondents should be estopped from terminating the lease; and
>
> D. The equities favored opening the judgment, since failure to do so would result in the loss of jobs for over 80 employees, loss of goodwill, loss of permanent improvements, equipment and fixtures, and loss of investment in excess of $500,000.00.

The Petition was presented before the Honorable I. Martin Wekselman, who denied the Rule to Show Cause. Judge Wekselman did not afford Petitioners a hearing or an opportunity to prove their averments, but instead, relied solely upon the prior decision of Judge Strassburger, which denied Petitioners' Motion for a Preliminary Injunction. Petitioners filed an appeal from Judge Wekselman's decision to the Superior Court of Pennsylvania, which was docketed at No. 1508 PGH 1987.

With the aid of the Sheriff of Allegheny County, Respondents then sought to forcibly evict Petitioners from the premises. As a result, Encore Associates, Inc. filed a Petition under Chapter 11 of the Bankruptcy Code, which was docketed in the United States Bankruptcy Court for the Western District of Pennsylvania at No. 87-2794. Respondents filed a Motion for Relief from the Automatic

Stay, which was granted by the Honorable Bernard Markovitz by Order of November 24, 1987.[2]

Following the decision of Judge Markovitz, Petitioners discharged their prior legal counsel,[3] and retained current counsel, the law firm of Nernberg & Laffey, to represent their interests. Petitioners' new counsel reviewed the warrant of attorney, and determined that it did not authorize confession of judgment under the circumstances. Accordingly, counsel prepared a Petition to Strike the Judgment on behalf of Petitioners,[4] which asserted that:

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[2]By Order dated July 29, 1988, the Honorable Paul A. Simmons of the United States District Court for the Western District of Pennsylvania, withdrew the reference from the Bankruptcy Court. There has been no further activity in the case.

[3]The law firm of Brennan, Robins and Daley.

[4]New counsel also prepared a Motion to Amend Continued on following page

A. The warrant of attorney was exercised after the Respondents alleged that the lease expired. The lease did not provide for the warrant of attorney to extend beyond the lease term;

B. Article 15(b) of the lease permitted confession of judgment only if the tenant was in default as as the term "default" was defined in Article 13. Holding over beyond the lease term was not a ground for default as defined in Article 13;

C. Article 15(b) provided for 20 days' written notice prior to exercise of the warrant of attorney. Article 13, which defined default, required a 30 day written notice. No notice was given nor was it ever alleged that notice was given;

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the Complaint in Equity at No. GD87-13537, to assert that notice was not a condition precedent to exercise of the option to renew, but rather, due to the language of the lease, the notice provision was promissory in nature. By Order dated December 9, 1987, Judge Strassburger granted the Motion to Amend, but denied Petitioners' Motion to Grant Stay of Execution, Preliminary Injunction or Hearing based upon the amendment. The Petitioners filed an appeal from such denial to the Superior Court of Pennsylvania, which was docketed at No. 1694 PGH 1987.

D. The lease specifically provided a remedy for holding over, which was contrary to the right to confess judgment. Article 24 provided that holding over shall be subject to "immediate eviction" and that during the holdover, rent was to be double the amount called for under the lease; and

E. Article 16 of the lease provided that neither party waived any rights by their failure to exercise the same, so that failure to exercise the option was not a waiver thereof.

The Petition to Strike the Judgment was presented before the Honorable Ralph H. Smith, Jr., of the Court of Common Pleas of Allegheny County. Despite the provisions of Pennsylvania law that a void judgment is a nullity and may be stricken at any time,[5] Judge Smith held that the Petitioners' prior appeal of the refusal to open the judgment precluded his review of the matter. Accordingly, Judge

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[5]See, for example, Fourtees Co. v. Sterling Equipment Corporation, 242 Pa. Super. 340, 363 A.2d 1229 (1976).

Smith denied the Petition to Strike the Judgment. Petitioners also filed an appeal from Judge Smith's determination to the Superior Court of Pennsylvania, which was docketed at No. 1725 PGH 1987.

Petitioners then presented various Motions for Stay or Supersedeas Pending Appeal, which were denied by both the Superior Court and the Supreme Court of Pennsylvania. Thereafter, the Sheriff of Allegheny County, acting under the authority of the Confession of Judgment, forcibly evicted Petitioners from their business premises.

The four appeals pending before the Superior Court were then consolidated for briefing and argument. By its Memorandum Opinion and Order dated October 28, 1988, the Superior Court affirmed all four orders of the

lower court. In so doing, the Superior Court, held, inter alia, that:

> 1. The trial court properly relied upon the denial of the preliminary injunction in refusing Petitioners' Motion to Open the Confessed Judgment, since the Petitioners "presented the same argument" in each case; and
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> 2. The "Petitioners waived their right to strike the judgment" by failing to include the grounds raised in the Petition to Strike in their original Petition to Open the Judgment.

The Superior Court also granted Respondents' Application for Counsel Fees Pursuant to Pa. R.A.P. 2744 (which authorizes the imposition of counsel fees for "frivolous" appeals), and remanded the case to the trial court to determine the amount of fees to be imposed.[6]

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[6]Respondents sought counsel fees for time spent in opposing the appeals at Nos. 1694 PGH 1987 and 1725 PGH 1987. By his Order dated May 24, 1990, the Honorable Eugene B. Strassburger, III imposed Counsel Fees against the Petitioners in the amount of $2,564.00.

Petitioners filed two separate Petitions for Allowance of Appeal to the Supreme Court of Pennsylvania,[7] which were docketed at No. 633 W.D. Allocatur Docket 1988 and No. 53 W.D. Allocatur Docket 1989. In support of the same, Petitioners asserted, inter alia, that:

> 1. The Pennsylvania procedures for confession of judgment were unconstitutional, since they permitted a judgment to be confessed, despite the fact that the lease executed by Petitioners did not authorize confession of judgment under the circumstances;
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> 2. The Superior Court's holding that Petitioners had waived the right to strike the judgment violated Petitioners' rights to due process of law, since such holding authorized confession of judgment even though the document executed by Petitioners did not;

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[7]The first Petition addressed the merits of the Superior Court's decision, while the second Petition dealt solely with the imposition of counsel fees.

3. The confession of judgment violated the principles of Swarb v. Lennox, 405 U.S. 191 (1972), since Petitioners did not knowingly bargain away their rights to a trial;

4. Judge Wekselman's refusal to open the judgment violated Petitioners' right to due process of law since he did not afford Petitioners a hearing on their request, but instead, relied solely upon Judge Strassburger's denial of Petitioners' Motion for a Preliminary Injunction; and

5. The Superior Court's Order imposing counsel fees violated Petitioners' rights to due process of law, since Petitioners were not afforded a hearing, and impinged upon their constitutional right to appeal adverse determinations of the lower court.

On March 12, 1990, the Supreme Court of Pennsylvania, without an opinion, entered Orders denying the Petitions for Allowance of Appeal. The Petitioners now seek review of such Orders by this Honorable Court.

ARGUMENT

This Honorable Court considered the constitutionality of confession of judgment under Ohio law in D.H. Overmyer Co., Inc. v. Frick Company, 405 U.S. 174, 92 S.Ct. 774, 31 L.Ed.2d 124 (1972). In Overmyer, Justice Blackman, writing for the Majority, held that confession of judgment under a cognovit note was not unconstitutional per se, and would be upheld where the Defendant had knowingly and intentionally waived its right to due process of law. The Court specifically found that Overmyer had agreed to the cognovit note as part of a bargained-for exchange, for which it received a release of mechanic's liens, an extension of time for payment and a lower interest rate. Accordingly, the Court upheld the confession of judgment under the circumstances:

> We therefore hold that Overmyer, in its execution and delivery to Frick of the second installment note containing the cognovit provision, voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.

405 U.S. at 187. The Court also expressly stated that its decision would not control cases where there was no intelligent waiver of the right to due process:

> Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

405 U.S. at 188. In a concurring opinion, joined by Justice Marshall, Justice Douglas noted that the Ohio procedures for contesting

a judgment by confession imposed only a minimal burden upon Defendants. Thus, comparing the Ohio post-judgment procedures to those under Pennsylvania law,[8] Justice Douglas found that the Ohio courts were dutybound to open a judgment by confession, as long as the Defendant posed a defense to the judgment which raised a jury question:

> Thus it would appear that the Ohio confessed judgment may be opened if the debtor poses a jury question, that is, if his evidence would have been sufficient to prevent a directed verdict against him. That standard is a minimal obstacle. The fact that a trial judge is dutybound to vacate judgments obtained through cognovit clauses where debtors present jury questions is a complete answer to the contention that unbridled discretion governs the disposition of petitions to vacate.

405 U.S. at 189-190 (emphasis in the original).

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[8]Pa. R.C.P. 2959(e) provides in relevant part: "If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment."

The limitations upon the holding in Overmyer were illustrated by the decision in Swarb v. Lennox, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972), which was decided on the same day. In Swarb, a three-judge District Court held that the Pennsylvania procedures for confession of judgment were violative of due process, unless, "there has been an understanding and voluntary consent of the debtor in signing the document" 405 U.S. at 198. Noting the "pervasive and drastic character of the Pennsylvania system" 405 S.Ct. at 195, this Court affirmed the decision of the District Court, concluding as follows:

> In our second concluding comment in Overmyer, supra, 405 U.S., at 188, 92 S.Ct., at 783, we state that the decision is ' not controlling precedent for other facts of other cases,' and we refer to contracts of adhesion, to bargaining power disparity, and to the absence

> of anything received in return for a cognovit provision. When factors of this kind are present, we indicate, 'other legal consequences may ensue.' That caveat has possible pertinency for participants in the Pennsylvania system.

405 U.S. at 201 (emphasis added).

In reliance upon the decisions in Overmyer and Swarb, several federal courts have held the Pennsylvania procedures for confession of judgment to be unconstitutional on the basis of the facts before them. In Engle v. Shapert Construction Company, 443 F.Supp. 1383 (M.D. Pa. 1978), the district court held that a confession of judgment under a cognovit note violated the plaintiffs' rights to due process of law, when the plaintiffs signed the cognovit "with no knowledge of its meaning or possible consequences" 443 F.Supp. at 1387. Accordingly, the court permanently enjoined enforcement of the confessed judgment, even

though the plaintiffs had recourse to state law procedures to challenge the judgment:

> It appears that the confessed judgment could be stricken if the Engles were to raise our decision in their favor in state proceedings, See Pa. R. Civ. P. 2959. However, we do not believe that they should be put to this additional burden to vindicate their rights.

443 F. Supp. at 1387. In Piercy v. Heyison, 565 F.2d 854 (3rd Cir. 1977), the plaintiff challenged the constitutionality of a Pennsylvania statutory procedure, which permitted license suspensions for non-payment of a judgment rendered under a cognovit note. The district court granted defendants' motion for summary judgment, but the Third Circuit reversed, holding that the plaintiff had presented a substantial Constitutional question:

> We agree with Mrs. Piercy that, far from being foreclosed by prior decisions of the Supreme Court, her

> contention that section 1413(a) is unconstitutional when applied without a hearing to coerce payments of cognovit note judgments presents under Bell v. Burson, D.H. Overmyer Co. v. Frick Co., and Swarb v. Lennox a substantial claim which should not have been decided by a single district judge.

565 F.2d at 860. In Virgin Islands National Bank v. Tropical Ventures, Inc., 358 F.Supp. 1203 (D.V.I. 1973), the district court held that confession of judgment against a corporate defendant, was violative of due process, absent a pre-judgment determination that the defendant had voluntarily waived its constitutional rights:

> Since the rights lost in a confession of judgment are probably the most fundamental in our legal system, I will further hold that the defendant must be afforded a full hearing on the voluntariness of his waiver before judgment may be entered against him.

358 F.Supp. at 1205 (emphasis added). More recently, in In Re Souders, 75 B.R. 427 (E.D. Pa. 1987), the U.S. Bankruptcy Court for the Eastern District of Pennsylvania determined that the Pennsylvania statutory scheme for confession of judgment was unconstitutional on its face. As held by the Court:

> The Pennsylvania statutory scheme, as of 1962 (and, we might add, today as well) contains no provision by which it can be judicially determined, prior to the entry of judgment, whether the obligor has waived his or her due process rights in executing a document containing a confession of judgment clause. Thus, the requisite means to determine whether facts comparable to the Overmyer situation, in which confession was held permissible, are conspicuously absent. The Pennsylvania statutory scheme allowing the entry and execution upon confessed judgments pursuant to which judgment was entered against the Debtors here is thus unconstitutional on its face, and therefore the judgment cannot be credited by us.

75 B.R. at 436.

In the present case, as in the above authorities, the confession of judgment against the Petitioners violated their rights to due process of law.

First, unlike the Defendant in Overmyer, the Petitioners did not knowingly bargain for the warrant of attorney that was set forth in the lease. Rather, as set forth in their Petition to Open Judgment, any consent to the confession of judgment was vitiated by the conflict of interest of Leonard Mendelson, Esquire, who represented both parties in the transaction. Such a conflict clearly constituted grounds to vacate the judgment under Pennsylvania law. See, Slater v. Rimar, Inc., 462 Pa. 138, 338 A.2d 584 (1975); Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 135 A.2d 252 (1957). Under similar circumstances, this Honorable Court has held that

such a conflict constitutes grounds for vacating a sentence or reversing a conviction under the due process clause. See Wood v. Georgia, 450 U.S. 261, 273-274, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981):

> That court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

See also, Dunton v. County of Suffolk, 729 F.2d 903 (2nd Cir. 1984), in which the United States Court of Appeals for the Second Circuit granted a new trial to a defendant in a civil case, since his defense had been tainted by a conflict of interest. In the present case, Judge Wekselman refused to even consider the

conflict when he denied the Petition to Open the Judgment. Rather, as set forth above, Judge Wekselman denied the Petition on the sole basis of Judge Strassburger's earlier decision which denied Petitioners' Motion for a Preliminary Injunction. However, the conflict of interest of Leonard Mendelson was not even raised in the injunction proceedings.[9]

Moreover, Judge Wekselman's reliance upon the decision to deny the preliminary injunction, in and of itself, denied Petitioners their right to due process of law. In Overmyer, this Court noted that the Ohio procedures for contesting judgments by confession

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[9]Even if such issue had been raised, denial of the preliminary injunction would not have been grounds for denial of the Petition to Open Judgment. On the contrary, the law is clear that a decision rendered on a request for a preliminary injunction is not on the merits and thus has no res judicata effect. See, Allbright v. Wella Corporation, 240 Pa. Super. 563, 359 A.2d 460 (1976).

imposed only a minimal burden upon Defendants, since as long as they raised a jury question, the court was dutybound to open the judgment. The courts of Pennsylvania are required to apply a similar standard when considering a Petition to Open Judgment. Thus, Pa. R.C.P. 2959(e) provides that:

> If evidence is produced which in a jury trial would require the issues to be submitted to the jury the court shall open the judgment.[10]

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[10]Rule 2959(e) was amended in 1973 to specifically address the concerns set forth in Overmyer. See, Ritchey v. Mars, 227 Pa. Super. 33, 324 A.2d 513, 515 (1974):

> Thus, a court can no longer weigh the evidence in support of the defense, but must only determine whether there is sufficient evidence to allow the issue to go to the jury. The modification of this rule may have been necessary in order for confession of judgments to meet due process standards. See D.H. Overmyer, Inc. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972) (concurring opinion).

See also, 8 Goodrich Amram 2d, Pa. Procedural

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(Emphasis added). Contrary to both the provisions of the Rule and this Court's holding in Overmyer, Judge Wekselman refused to consider whether Petitioners had raised a jury question. Instead, he relied solely upon the prior decision denying Petitioners' Motion for

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Rules Service, § 2959:1 (1977):

> Historically it has been the rule in Pennsylvania that the opening of a confessed judgment is a matter within the discretion of the Common Pleas Court and the appellate courts will not reverse unless there has been an abuse of discretion. This requires the defendant to do more than produce evidence which, if believed, would constitute a defense; it places on him the burden of persuading the court to open the judgment.
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> The 1973 amendment meets this problem by adding a new sentence to subdivision (e) of Rule 2959, stating specifically that if the defendant produces evidence which in a jury trial would require the issues to be submitted to a jury, the court shall open the judgment.

a Preliminary Injunction. However, the proof required for issuance of a preliminary injunction constitutes far more than the "minimal burden" anticipated by Overmyer. Thus a plaintiff seeking a preliminary injunction must establish a clear right to relief, Straup v. Times Herald, 283 Pa. Super. 58, 423 A.2d 713 (1980), that he has no adequate remedy at law, that injury is imminent, Sameric Corp. of Market Street v. Goss, 448 Pa. 497, 295 A.2d 277 (1972) and that the injury is irreparable. Id. Even if every one of these elements is proven, the court still must balance the hardships between the parties before issuing the injunction. Leonard v. Thornburgh, 74 Pa. Cmwlth. 553, 463 A.2d 77 (1983).

By contrast, a party seeking to open a confessed judgment is required to prove only that it has a meritorious defense, Frigidinners, Inc. v. Branchtown Gun Club, 176 Pa.

Super. 643, 109 A.2d 202 (1954), by presenting evidence sufficient to justify submission of the issue to a jury. Tenreed Corp. v. Philadelphia Folding Box Co., 256 Pa. Super. 49, 389 A.2d 594 (1978). The party seeking a rule to show cause why the judgment should not be opened need only allege such facts.

The courts below also violated Petitioners' rights to due process when they held that Petitioners had waived their rights to have the judgment stricken. The Superior Court relied upon Pa. R.C.P. 2959(c), which provides that "A party waives all defenses and objections which he does not include in his petition or answer." Thus, the Superior Court held that since Petitioners had already filed a Petition to Open the Judgment, they had waived any right to have the judgment stricken. However, Rule 2959(c) has never been applied to permit the waiver of fundamental

defects in a judgment.[11] To permit such an application in the present case implicates Petitioners' due process rights.

Assuming, arguendo, that Petitioners knowingly consented to the confession of judgment provision as required by Overmyer and its progeny, such consent could only extend to a confession of judgment which conformed with

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[11]See Roselon Industries, Inc. v. Associated Knitting Mills, 221 Pa. Super. 8, 289 A.2d 239, 241 (1972):

> While it is true that a defendant who seeks to open a judgment is generally held to waive irregularities in the entry of the judgment which might have been attacked by a motion to strike, a petition to 'open a judgment does not constitute a waiver of a fundamental or vital defect-for instance, where plaintiff had no right to enter the judgment.'

See also, Fleck v. McHugh, 241 Pa. Super. 307, 361 A.2d 410 (1976); Fourtees Co. v. Sterling Equipment Corporation, 242 Pa. Super. 340 363 A.2d 1229 (1976), holding that a void judgment is a nullity and may be stricken at any time.

the warrant of attorney which they signed. The warrant of attorney at issue required written notice to be given twenty (20) days prior to confession of judgment. However, no such notice was given to Petitioners. In addition, the warrant of attorney only authorized confession of judgment for a default as defined in Article 13 of the lease. Petitioners did not commit an Article 13 default, and the Complaint in Confession of Judgment did not even allege that they did. Thus, since the confession of judgment violated the warrant of attorney, it was fundamentally defective.[12] To invest such judgment with validity under the doctrine of waiver violated

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[12]Such defects clearly constituted grounds for striking the judgment under Pennsylvania law. See, A.B. & F. Contracting Corporation v. Mathews Coal Co., Inc., 194 Pa. Super. 271, 166 A.2d 317 (1960); Dameron v. Woods Restaurant, Inc., 305 Pa. Super. 346, 451 A.2d 681 (1982).

Petitioners' due process rights as defined by Overmyer.[13]

All of the above matters should have been recognized, addressed and decided by the Pennsylvania Courts before Petitioners were deprived of their lease under the authority of the warrant of attorney. As a result of the confession of judgment, Petitioners' business, which had a value in excess of $1,000,000.00, has been completely destroyed. Petitioners

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[13]Application of the waiver doctrine was particularly inappropriate in view of the requirement, under Pennsylvania law, that a party seeking to open a judgment must file his petition "promptly." Delays of 63 days (Mahler v. Emrick, 300 Pa. Super. 244, 446 A.2d 321 (1982)), 37 days (Hatgimisios v. Dave's N.E. Mint, Inc., 251 Pa. Super. 275, 380 A.2d 485 (1977)) and even 27 days (Texas & B.H. Fish Club v. Bonnell Corporation, 388 Pa. 198, 130 A.2d 508 (1957)), have been held to be excessive and thus a basis for denial of opening the judgment. By contrast, Pennsylvania law imposes no time limitations upon the filing of a petition to strike a judgment. See, Green Ridge Bank v. Edwards, 247 Pa. Super. 231, 372 A.2d 23 (1977).

have been deprived of the value of the improvements which they made to the property, worth in excess of $400,000.00, and have lost the $155,000.00 which they paid to Respondents for their interest in the business. Moreover, Petitioners were required to personally pay in excess of $300,000.00, to satisfy the remaining balance of the IDA loan. Since Petitioners were never afforded a hearing to determine the validity of the warrant of attorney, they were clearly deprived of their rights to due process of law.

Finally, despite the clear law that a void judgment may be stricken at any time,[14]

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[14]See authorities cited in Footnote 11. Moreover, despite the waiver provision of Rule 2959(c), several cases have permitted the filing of successive petitions to open a judgment, when the equities of the case justified relief from judgment. See, 12 Standard Pennsylvania Practice 2d, §71:106 (1983):

The discharge of a rule to open a

Continued on following page

the Superior Court imposed counsel fees against Petitioners for their appeal from the lower court's order refusing to strike the judgment. Such imposition not only violated Petitioners' rights to due process, but also creates a chilling effect upon effective advocacy. The Superior Court relied upon Pa.

Continued from previous page

> judgment does not necessarily preclude a court's favorable consideration of a subsequent application to open the judgment. A rule to open a judgment will not be discharged in a proper case without prejudice to file a new application on a different ground.

See also, Robar Development Corporation v. John Bamberry, No. 215 PGH 1987 (March 30, 1988), in which counsel for the Petitioners herein was unsuccessful in challenging a second petition to open judgment under the waiver doctrine. Since Robar was a "Memorandum" decision, it cannot be cited as precedent under Pennsylvania law. However, it indicates that Petitioners' appeal was not "frivolous", but rather that the Superior Court has in fact permitted successive Petitions as requested by Petitioners. Thus, while it may not be "legal" precedent, it is certainly factual precedent that Petitioners' claim was not frivolous.

R.A.P. 2744, which permits the imposition of counsel fees as a sanction for appeals which are "frivolous or taken solely for delay." However, the Superior Court made no specific finding that the appeal was frivolous or taken solely for delay, nor did it afford Petitioners a hearing on this issue. Such is required under both Pennsylvania and federal law. See, Carter v. Commonwealth of Pennsylvania Board of Probation and Parole, 117 Pa. Cmwlth. 635, 544 A.2d 107 (1988); Gaiardo v. Ethyl Corporation, 835 F.2d 479 (3rd Cir. 1987), in which the United States Court of Appeals for the Third Circuit held that counsel fees may not be awarded under F.R.C.P. 11, unless the court makes a specific finding that the claim was frivolous. Here, the Superior Court justified the imposition of fees solely "upon affirmance of the Order of the trial court." However, affirmance alone does not constitute a basis

for the imposition of counsel fees. See, City of Erie v. International Association of Firefighters, Local 293, 104 Pa. Cmwlth. 394, 522 A.2d 132, 135 (1987):

> To say that the appeal is frivolous merely because we decide that the position taken by Appellant is incorrect would suggest that in every case where a litigant loses, the appeal was frivolous, a conclusion this court does not countenance.

Moreover, such an interpretation creates a chilling effect upon effective advocacy. See, Dura Systems, Inc. v. Rothbury Investments, Ltd., 886 F.2d 551, 556 (3rd Cir. 1989):

> Although the Rule imposes a duty of reasonable inquiry as to both facts and law, it is 'not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.' Fed. R. Civ. P. 11 (advisory committee notes).

Finally, since Petitioners were not afforded a hearing on the merits of their Petition to Strike the Judgment, the imposition of counsel fees against them violates their due process right to appeal from the determination of the lower court. See, Lindsay v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972).

CONCLUSION

In conclusion, Petitioners respectfully request this Honorable Court to grant the within Petition for Writ of Certiorari and to reverse the decisions of the courts below.

NERNBERG & LAFFEY

By: James R. Cooney

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

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March 14, 1990

James R. Cooney, Esquire
Nernberg & Laffey
301 Smithfield Street
Pittsburgh, Pa. 15222

In Re: Willard C. Shiner, et al. v. Encore Associates, Inc., etc.
No. 633 W.D. Allocatur Docket 1988
Encore Associates, Inc., etc., et al. v. Willard C. Shiner, et al.
No. 53 W.D. Allocatur Docket 1989

Dear Mr. Cooney:

The Court has entered the following Order on your Petitions for Allowance of Appeal in the above matters:

"3/12/90
Petition Denied
Per Curiam
Mr. Justice Cappy did not participate in the consideration of this case."

Very truly yours,
s/ Irma T. Gardner
DEPUTY PROTHONOTARY

ITG:cho
cc: Ronald G. Backer, Esq.
Hon. I. Martin Wekselman
Hon. Eugene Strassburger
Hon. Ralph H. Smith, Jr.

ENCORE ASSOCIATES, INC., A PENNSYLVANIA CORPORATION AND EUGENE P. WEISMAN AND JANE E. WEISMAN, HIS WIFE, Appellants	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	)	
WILLARD C. SHINER AND RUTH M. SHINER	)	NO. 01411 PITTSBURGH, 1987

Appeal from the Order entered
in the Court of Common Pleas of Allegheny
County, Civil Division, No. GD87-13537

WILLARD C. SHINER AND RUTH M. SHINER,	)	
v.	)	
ENCORE ASSOCIATES, INC., A PENNSYLVANIA CORPORATION, Appellant.	)	NO. 01508 PITTSBURGH, 1987

Appeal from the Order entered
in the Court of Common Pleas of Allegheny
County, Civil Division, NO. GD 87-17492

ENCORE ASSOCIATES INC. A PENNSYLVANIA CORPORATION, AND EUGENE P. WEISMAN AND JANE E. WEISMAN Appellants	)	
v.	)	
WILLARD C. SHINER AND RUTH M. SHINER	)	NO. 01694 PITTSBURGH, 1987

Appeal from the Order entered
in the Court of Common Pleas of Allegheny
County, Civil Division, No. GD 87-13537

WILLARD C. SHINER)
AND RUTH M. SHINER)
)
v.)
)
ENCORE ASSOCIATES)
INC. A PENNSYLVANIA)
CORPORATION,)
Appellant) NO. 01725 PITTSBURGH,1987

Appeal from the Order entered
in the Court of Common Pleas of Allegheny
County, Civil Division, No. GD 87-17492

MEMORANDUM: FILED: OCTOBER 28, 1988

This case involves four consolidated appeals from Orders entered in two separate actions involving a single transaction, with a complex procedural history involving numerous pleadings at various levels of the state and federal court systems. We find it necessary to set out the procedural history in great detail as an aid in analyzing this case and for the benefit of those who may subsequently be required to further review these matters.

The first action is an injunction action brought by appellants, Eugene P. Weisman and his wife Jane E. Weisman and Encore Associates, Inc., to enjoin appellees, Willard C. Shiner and his wife Ruth M. Shiner, from taking any action concerning certain leased premises. The second action is a confession of judgment for possession action brought by appellees against appellants to eject appellants from the leased premises. In all, four Orders are appealed from below, two from each action: (1) at No. 01411, a September 30, 1987 Order of the trial court which denied appellants' petition requesting a preliminary injunction; (2) at No. 01508, an October 13, 1987 Order dismissing appellants' petition to open judgment by confession; (3) at No. 01694, a December 9, 1987 Order denying appellants' motion for a stay of execution, preliminary injunction, or hearing; and (4) at No. 01725, a December 15, 1987 Order

denying appellants' petition to strike the judgment by confession.

On October 1, 1981, appellants, Eugene P. Weisman and his wife Jane E. Weisman, purchased 50 per cent of the stock of Encore, Inc., for $50,000 from appellees Willard C. Shiner and his wife Ruth Shiner. Appellees were the owners of property in the Shadyside area of Pittsburgh on which Encore, Inc., operated a bar and restaurant, using a two-thousand square foot storeroom.

As part of the Weismans' purchase of their 50 per cent interest in Encore, Inc., a lease for the property was entered into by the Shiners, as landlord, and Encore, Inc., as tenant. Encore, Inc., is the predecessor to appellant Encore Associates, Inc. At the time of the lease, the Weismans and Shiners each owned 50 per cent of the stock of Encore, Inc. The term of the lease was for six years, commencing on October 1, 1981, and ending on September 30,

1987. The lease also contained two five-year options to renew. Pursuant to Paragraph 2 of the Lease, in order to exercise the first option to renew, notice of the exercise of the option must have been given at least six months prior to the expiration of the original term of the Lease, or not later than March 31, 1987.

An application for funding from the Allegheny County Industrial Development Authority ("IDA") for renovations in the amount of $600,000 was made in October of 1981, the time the transaction was originally conceived, and was approved on April 30, 1982. The business was expanded as contemplated, at a cost of $750,000, with Mr. Weisman and Mr. Shiner each providing $75,000 in additional funds to pay for cost overruns. The renovations to the property consisted primarily of structural changes in order to operate an expanded bar and restaurant, the installation of a new roof and a small expansion in the rear of the building.

The business commenced operations under the name of Brendan's in 1982, all in accordance with the parties' business plan.

In April of 1982, a new corporation, Encore Associates, Inc., (hereinafter "Encore") was formed by Eugene P. Weisman and Willard Shiner. Encore, Inc., merged into this new corporation with the Shiners and the Weismans each having 50 per cent interest in the stock of the new corporation. In January of 1985, the Weismans purchased the Shiners' interest in Encore for $105,000. At that time, an indemnification agreement was entered into in which the Weismans indemnified the Shiners on the IDA loan. The indemnification was secured by a security agreement dated May 10, 1985. No new lease agreement was entered into.

On or about April 21, 1987, Encore sent to the Shiners, for the first time, a notice of the exercise of the first option of the lease. The Shiners wrote back to Encore, advising that

since the exercise of the option was untimely, the lease would not be extended past September 30, 1987 and the tenant should vacate the premises on or before that date.

On or about August 23, 1987, appellants filed an action in equity against the appellees seeking to permanently enjoin appellees from showing the lease premises to prospective tenants and from evicting appellee from the property. A hearing was held on September 29, 1987 before the Honorable Eugene B. Strassburger, III, of the Court of Common Pleas of Allegheny County, on appellants' request for a preliminary injunction. By Order dated September 30, 1987, appellants' request was denied. Appellants filed a timely appeal from that Order on October 6, 1987, at No. 01411 Pittsburgh, 1987.[1]

---

[1]In appellants' injunction action, they sought to first preliminarily and later permanently enjoin appellees from: 1) posting the premises for rent or showing the premises to

Continued on following page

On October 5, 1987, appellees obtained a confessed judgment for possession against appellants. On October 9, 1987, the appellants filed an application for stay or injunction pending appeal to this Court at No. 01411 Pittsburgh, 1987, which was denied. On October 13, 1987, the appellants filed an amended application for stay or injunction pending appeal, which was denied the same day. Appellants appealed the denial of their amended application to the Pennsylvania Supreme Court at No. 92 WD Misc. Docket on October 14, 1987. This application was granted by the Supreme Court on October 15, 1987, pending the filing of an answer by appellees, which was due by October 19, 1987.

Continued from previous page
prospective tenants; 2) entering the premises; and 3) interfering with appellants quiet and peaceful possession and enjoyment of the premises until the end of the term of the outstanding obligation of Encore to the lender bank and the end of the lease's option periods.

In the meantime, appellant Encore filed a Chapter 11 bankruptcy petition with the United States Bankruptcy Court for the Western District of Pennsylvania at No. 87-2794 on October 15, 1987. As a result of the filing of the bankruptcy petition, the Supreme Court, on October 21, 1987, rescinded its October 15, 1987 Order granting a temporary injunction pending appeal.

Prior to the bankruptcy filing, the appellants filed a petition to open judgment confessed in ejectment, seeking to open the confessed judgment for possession entered against them. On October 13, 1987, appellants presented the petition requesting a rule upon appellees to show cause why the confessed judgment should not be opened before the Honorable Martin Wekselman of the Court of Common Pleas of Allegheny County. The petition was dismissed that same day without a rule being

issued. On October 29, 1987, appellants appealed the Order at No. 01508 Pittsburgh, 1987.

Due to the bankruptcy filing, appellees were prohibited from executing upon their writ of possession obtained as a result of the confessed judgment. The appellees duly filed with the bankruptcy court a motion for relief from the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. §101 et seq., which was granted on November 24, 1987 following argument.

On December 3, 1987, appellants/Weismans filed before the Supreme Court an application to reinstitute the high Court's earlier rescinded temporary stay of October 15, 1987 at No. 92 WD Misc. Docket. On December 4, 1987, the bankruptcy court's Order granting appellees' motion for relief from the automatic stay was appealed to the United States District Court for the Western District of Pennsylvania.

On December 7, 1987, appellants presented a petition to strike the October 5, 1987 confessed judgment before the Honorable Ralph A. Smith of the Court of Common Pleas of Allegheny County, who took the petition under advisement.

On December 9, 1987, appellants made another motion for a preliminary injunction to the Honorable Eugene B. Strassburger, III, based upon amended pleadings filed in the equity matter in the Court of Common Pleas of Allegheny County. This Motion was summarily denied by Judge Strassburger on that date. Judge Strassburger's denial was also appealed in a timely manner on December 9, 1987 at No. 01694 Pittsburgh, 1987, with an accompanying motion for stay or supersedeas pending appeal to this Court. On December 9, 1987, appellants presented a motion for a stay pending appeal to the bankruptcy court requesting a stay of its November 24, 1987 Order granting relief from

the automatic stay to appellees pending appeal of said Order to the federal district court. This motion was denied by Order and Opinion dated the same day.

On December 10, 1987, we granted appellants a temporary stay pending appeal in the appeal at No. 01694 Pittsburgh, 1987, in response to their December 9, 1987 motion, which accompanied their appeal of Judge Strassburger's denial of their second request for a preliminary injunction. This temporary stay was rescinded the same day following the filing of an answer by the appellees and the Opinion by Judge Strassburger. On December 11, 1987, appellants filed a motion for reconsideration of the rescinded stay with our Court.

Meanwhile, in the Pennsylvania Supreme Court, appellants' application to reinstitute the stay pending appeal was denied on December 7, 1987, by the Honorable Justice Nicholas P.

Papadakos, whereupon, an application for reconsideration by the entire Court of the Order denying the stay was filed on December 8, 1987.

On December 10, 1987, appellants filed a motion for stay with the federal district court, seeking to stay the bankruptcy court Order granting appellees' relief from the automatic stay provisions of the Bankruptcy Code, supra. On December 14, 1987, the district court filed an Order and Opinion denying said request. Appellants appealed the district court's Order to the United States Court of Appeals for the Third Circuit that day. On December 15, 1987, appellants presented to the Honorable Joseph F. Weis of the Third Circuit an emergency motion for a stay or injunction pending appeal, which was denied.

By Order dated December 15, 1987, Judge

Smith of the Common Pleas Court acted on appellants' petition to strike the confessed judgment, which he had had under advisement, by denying it. This Order was timely appealed to our Court on December 15, 1987 at No. 01715 Pittsburgh, 1987. A motion for a stay pending that appeal was presented to Judge Smith at the trial court level and denied on December 16, 1987 and presented to this Court on December 17, 1987. We temporarily granted and subsequently vacated the motion on the same day following the filing of a response thereto by the appellees.

Upon a thorough review of the record, we find that appellants' assertions are without merit and each Order is affirmed.

I.

At No. 01411, appellants claim the trial court erred in denying their request for a

preliminary injunction. Appellants claim the court erred in applying the parole evidence rule to exclude extrinsic evidence to aid in interpreting the lease. They argue the lease between the parties is ambiguous and earlier drafts of the lease agreement, as well as evidence concerning the parties' relationship, are necessary to show timely notice or even any notice, was unnecessary to exercise the renewal option.

In Mazzie v. Commonwealth, 495 Pa. 128, 133, 432 A.2d 985, 988 (1981), our Supreme Court defined the general standard of review on appeal from the grant or denial of a preliminary injunction as follows:

> [O]n an appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule

> of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the Chancellor.

Intraworld Industries Inc. v. Girard Trust Bank, 461 Pa. 343, 336 A.2d 316 (1975). Thus the scope of review for failure to grant a preliminary injunction is narrow. Shenango Valley Osteopathic v. Department of Health, 499 Pa. 39, 451 A.2d 434 (1982).

Generally, preliminary injunctions are preventive in nature and are designed to maintain the status quo until the rights of the parties are finally determined. Mazzie, supra. A preliminary injunction of any kind should be granted only where the rights of the plaintiff are clear, the need for relief is immediate, and injunctive relief is necessary to avoid injury which is irreparable and cannot be compensated for by damages. Township of South Fayette v. Commonwealth, 477 Pa. 574, 385 A.2d 344 (1978). Where the threat of immediate and

irreparable harm to the petitioning party is evident, the injunction does no more than restore the status quo, and greater injury would result by refusing the requested injunction than granting it, an injunction may properly be granted to determine the rights of the respective parties with respect to substantial legal questions. Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123 (1981).

The trial court concluded appellants had not met at least two of the requirements for a preliminary injunction. The trial court found appellant had not presented convincing evidence of irreparable injury should relief be denied. Appellant Weisman testified the bar and restaurant, known as Brendan's, was not netting him any money but merely grossed enough to pay bills. Therefore, if the court erred in not granting the preliminary injunction, money damages were readily calculable. See Township

of South Fayette, supra. While it is possible to meet the requirement of irreparable harm where the harm alleged is solely monetary, Three County Services, Inc. v. Philadelphia Inquirer, 337 Pa. Super. 241, 486 A.2d 997 (1985), based upon the construction of the lease and the late exercise of the option, appellant has failed to show a clear right to the relief requested.

Judge Strassburger permitted no evidence to be introduced concerning the intention of the parties in forming the contract, their conduct, circumstances, or surroundings, ruling such evidence was barred by the parole evidence rule. Appellants assert they do not seek to contradict the terms of the lease, but insist the extrinsic evidence is necessary to interpret its terms.

In construing a contract, the intention of the parties is paramount and the court will adopt the interpretation which, under all

circumstances, ascribes the most reasonable, probable and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished. Where the words of the contract are clear and unambiguous, the intent of the parties must be determined exclusively from the agreement itself. Where the language of the written contract is ambiguous, extrinsic or parole evidence may be considered to determine the intent of the parties. Metzger v. Clifford Realty Corporation, 327 Pa. Super. 377, 476 A.2d 1 (1984). A contract will be found to be ambiguous:

> [I]f, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and

> a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction.

Id. at 386, 476 A.2d at 5 (citations omitted).

Turning to the lease itself, the term of the lease is set forth in article 2(a) as follows:

> The term of this Lease shall be for a period of six (6) years commencing on October 1, 1981 and ending on September 30, 1987.

In article 2(b), the lease goes on to provide for two five-year option periods to be exercised by written notice from tenant to landlord at least six months prior to the expiration of the original term, creating in effect a renewal period. The actual language of article 2(b) is as follows:

> Provided that this Lease is still in full force and effect, and Tenant is not in default of any of its term and

> conditions, there is hereby granted to Tenant the right and options to extend this Lease for two (2) additional five (5) year periods beyond the original term (the exercise of the second option being contingent on the exercise of the first option), commencing on the first day following the expiration of the original term, on the terms and conditions set forth herein. Said option shall be exercisable by written notice from Tenant to Landlord by certified mail, return receipt requested, at least six (6) months prior to the expiration of the original term or the renewal term.

(Emphasis added.) We find the lease provisions in question unambiguous, making parole evidence unnecessary.

Appellants contend by virtue of their having bought appellees' 50 per cent of the business and also by virtue of their having indemnified appellees on the IDA loan, the lease was extended at least to the length of the loan period. As the trial court stated:

> Thus, despite the fact that the lease itself is unaltered and provides for a six year term with two five year

> options, [appellants] would have this court find that they have a clear right to relief on the basis of a kind of osmosis from the other documents into the lease. This court frankly finds such a theory not only not clear, but thoroughly groundless.

(Slip Op., Strassburger, J., 10/15/87, p. 4.)

We agree.

In the alternative, appellants argue equity should excuse their failure to timely exercise the option. In Western Savings Fund Society of Philadelphia v. SEPTA, 285 Pa. Super. 187, ___, 427 A.2d 175, 178 (1981), we stated:

> It is a sound legal principle that unless an option is exercised within the time fixed it necessarily expires. This is so because time is always of the essence in an option contract '[W]hether the question arises either at law or in equity it is settled that "time is of the essence of an option".'

(Citations omitted; footnote omitted.)

A review of the record discloses appellants' manager testified he inadvertently exercised the option late. As we pointed out in Western Savings Fund Society of Philadelphia, supra, failure to give timely notice through inadvertence or negligence on the part of the lessee does not justify equitable intervention. Clearly, appellants failed to do that which they were required do in order to exercise the option under the lease terms. Therefore, appellants' right to relief is far from clear. We find the record supports the trial court's refusal to grant a preliminary injunction.

II.

At appeal No. 01508 appellants claim that, in refusing to grant a rule to show cause why the confessed judgment should not be opened, Judge Wekselman erroneously relied on the

earlier reasoning employed by Judge Strassburger in denying appellant's petition for a preliminary injunction.[2] Appellants argue this approach fails to take into account the fundamental differences between a rule to show cause why a judgment should not be opened and a preliminary injunction, and the quantum of proof necessary for each.

Here, appellants petition to open was dismissed and they were denied a rule upon appellees to show cause why the confessed judgment should not be opened. "The very right to issue a rule to show cause legally presupposes a judicial discretionary authority." Rosenberg v. Silver, 374 Pa. Super. 75, ___, 97 A.2d 92, 94 (1953). A rule to show cause is made ex parte and simply directs an adverse

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[2]We recognize that Encore is the sole appellant from the Orders appealed in the confession of judgment for possession action, however, due to the Weismans exclusive ownership of Encore we will refer to them collectively, as appellants, in this Memorandum.

party to show cause why an action should not be taken. Rusbarsky by Rusbarsky v. Rock, 324 Pa. Super. 28, 471 A.2d 107 (1984). In order to open a judgment by confession, appellants must comply with the requirements of Pa. R.C.P. 2959(b), which requires a petitioner state "prima facie grounds for relief" before a rule can issue. If such grounds do not exist, the court may not issue a rule to show cause. We must determine whether it was an abuse of discretion to deny a rule in this case.

Appellants petition avers that the lease between the parties provided for two options, each five years in length, which required six months written notice from appellants, as tenants, to appellees, as landlord, in order to exercise the options. Under the lease, the petition specifically avers the exercise of the first option period required written notice no later than March 31, 1987. The petition goes

on to aver that "[t]hrough an act of inadvertence" on appellants' part the written notice to exercise the option was twenty-one days late (paragraph 17). The petition contends that a series of circumstances after the lease was signed lulled appellants into believing strict compliance for the exercise of the option would not be required. Noticeably, the petition does not contend appellees ever formally agreed to a modification of the lease terms. This is the same argument appellants presented in their request for a preliminary injunction before Judge Strassburger. As found by Judge Strassburger and relied on by Judge Wekselman, the lease is clear and unambiguous. By pleading changed circumstances without demonstrating mutual intent to modify the lease and how the terms of the lease were not complied with, appellants failed to state prima facie grounds for relief which would justify opening the judgment by confession. As stated by Judge

Wekselman, appellants have not shown a "colorable defense" (Slip Op., Wekselman, J., 10/30/87, p. 2). Consequently, we find no abuse of discretion on the part of the trial court in refusing to issue a rule to show cause upon appellees.

III.

At No. 01694, appellants appeal the denial of their motion to grant stay of execution, preliminary injunction or hearing, which motion was filed in the injunction action. Appellants claim the motion was based upon new issues raised in the amendments to their complaint in the injunction action regarding interpretation of the lease provisions and appellees' alleged lack of a right to take possession of the premises.

The trial court found appellants previously raised the same issues in the prior

petitions to set aside the confessed judgment and the first petition for a preliminary injunction. We have reviewed the petition in conjunction with all those prior to it and agree with the court below. As so aptly and succinctly stated by the trial court:

> The relief sought herein was denied three times by this judge, once by Judge Wekselman of this court, twice by the Superior Court, twice by the Supreme Court and once by the Bankruptcy Court. Litigation must end at some point.

(Slip Op., Strassburger, J., 12/10/87, p. 1.)

IV.

At No. 1725, appellants claim the trial court erred in refusing to grant their petition to strike the confessed judgment. As discussed earlier, appellants presented a petition to open the confessed judgment on October 13, 1987 and appealed its dismissal to our Court on

October 29, 1987. Subsequently, on December 7, 1987, appellants presented the subject petition to strike the confessed judgment. We agree with the trial court that appellants' petition to strike was not properly raised and all defenses and objections contained therein are waived.

Pennsylvania Rule of Civil Procedure 2959(a) specifically mandates "[a]ll grounds for relief, whether to strike off a confessed judgment or to open it, must be asserted in a single petition." Further, subsection (c) of the rule provides: "[a] party waives all defenses and objections which he does not include in his petition or answer." Rule 2959 clearly requires that all grounds to strike or open a judgment by confession should be consolidated in a single petition. Kophazy v. Kophazy, 279 Pa. Super. 373, 421 A.2d 246 (1980); Roselon Industries, Inc. v. Associated Knitting Mills, 221 Pa. Super. 8, 289 A.2d 239 (1972); see

Leasing Service Corporation v. Benson, 317 Pa. Super. 439, 464 A.2d 402 (1983) (dissallowing a "supplemental" petition to open on the basis of Pa. R.C.P. 2959(a) and (c)). Accordingly, we will not reach the merits.

Orders affirmed.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ENCORE ASSOCIATES, INC, a Pennsylvania corporation and EUGENE P. WEISMAN and JANE E. WEISMAN,

Plaintiffs,

v.

WILLARD C. SHINER and RUTH M. SHINER,

Defendant.

CIVIL DIVISION

No. GD 87-13537

OPINION
JUDGE GENE STRASSBURGER

Copies to:

John Daley, Esq.

Ronald G. Backer, Esq.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ENCORE ASSOCIATES, INC, a Pennsylvania corporation and EUGENE P. WEISMAN and JANE E. WEISMAN, Plaintiffs,	CIVIL DIVISION No. GD 87-13537
v.	OPINION JUDGE GENE STRASSBURGER
WILLARD C. SHINER and RUTH M. SHINER, Defendant.	

O P I N I O N

STRASSBURGER, J.

On August 12, 1987, Plaintiffs filed a complaint in equity including a prayer for a preliminary injunction seeking to enjoin the threatened termination of a written lease between the Defendants and Plaintiff, Encore Associates, Inc.

After hearing on September 29, 1987, this

court denied the preliminary injunction. This court's order reads:

> "AND NOW, this 30th day of September, 1987, after hearing, this court finds that Plaintiffs have failed to prove the prerequisites for the grant of a preliminary injunction, to-wit, a clear right to relief and the need for immediate relief to prevent irreparable injury, and therefore Plaintiffs' petition for a preliminary injunction is denied.
>
> BY THE COURT:
>
> /s/ Strassburger, J."

Despite the extremely narrow scope of review <1> Plaintiffs have appealed.

The cases are legion in setting forth a plaintiff's heavy burden that must be met to obtain a preliminary injunction:

> "In order to sustain a preliminary injunction the plaintiff's right to relief must be clear, the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted." Zebra v. Pittsburgh Sch. Dist., 449 Pa. 432, 437, 296 A.2d 748 (1972).

As set forth in this court's order of September 30, 1987, Plaintiffs have failed to satisfy two of the three prerequisites for the grant of a preliminary injunction.

This court was not convinced of Plaintiffs irreparable injury should relief be denied. The testimony of Plaintiff Eugene Weisman himself was to the effect that the restaurant business, Brendan's, was not netting him any money, but merely grossed enough to pay bills, including the IDA note. It would appear that, based upon this testimony, the money damages Plaintiffs would suffer if this court erred in denying the preliminary injunction were readily calculable — the value of the IDA note and perhaps some goodwill. This is hardly the "irreparable injury" required for the grant of a preliminary injunction.

This court recognizes that some authority exists that even where the alleged harm is

solely monetary as here, if it rises to the magnitude of the loss of a business, the prerequisite of irrepararable harm can be met. See Three County Services, Inc. v. Philadelphia Inquirer, 337 Pa. Superior Ct. 241, 486 A.2d 997 (1985).

Nonetheless, regardless of whether that prerequisite is met, Plaintiff has failed utterly to meet the prerequisite of showing a clear right to relief.

Certain factual background is necessary to understand Plaintiffs' claims.

On October 1, 1981, a lease was entered into for premises known as 5505-5509 Walnut Street, between Willard C. Shiner and Ruth M. Shiner as Landlord, and Encore, Inc., Plaintiffs' predecessor, as Tenant. The term of the lease was as follows:

> "The term of this Lease shall be for a period of six (6) years commencing on October 1, 1981 and ending on September 30, 1987."

The lease further provided for two five-year option periods to be exercised by written notice from tenant to landlord at least six months prior to the expiration of the original term or the renewal term. The actual language of the lease is as follows:

> "Provided that this Lease is still in force and effect, the Tenant is not in default of any of its terms and conditions, there is hereby granted to Tenant the right and options to extend this Lease for two (2) additional five (5) year periods beyond the original term (the exercise of the second option being contingent on the exercise of the first option), commencing on the first day following the expiration of the original term, on the terms and conditions set forth herein. Said option shall be exercisable by written notice from Tenant to Landlord by certified mail, return receipt requested, at least six (6) months prior to the expiration of the original term or the renewal term." (Emphasis added)

Plaintiffs' position is two-fold. They claim first that despite the clear wording of

the lease, it was not necessary to exercise the option. Plaintiffs state the argument in their trial brief as follows:

> "Did the parties by virtue of the transactions that were entered into after the execution of the lease and in particular the purchase by Eugene P. Weisman of the remaining interest of Willard C. Shiner and Encore Associates, Inc., and the execution of indemnification to save harmless provision in the agreement of sale, by necessity extend the term of the lease for the period of the outstanding obligation by Encore Associates, Inc. to Equibank. That is, did their conduct amount to a defacto exercise of said option.
>
> ANSWER: Yes."

Although phrased as quoted above, Plaintiffs are not really arguing that the option was exercised, but rather that there has been some kind of modification of the lease so that the term is extended for a vague term "for at least the term of the note" to Equibank. See Paragraph 20 of the Complaint. Thus, despite

the fact that the lease itself is unaltered and provides for a six year term with two five year options, Plaintiffs would have this court find that they have a clear right to relief on the basis of a kind of osmosis from the other documents into the lease. This court frankly finds such a theory not only not clear, but thoroughly groundless.

As an alternative, Plaintiffs claim that as a court of equity this court should have excused their late exercise of the option. However, under the circumstances of this case, the appellate case law of this Commonwealth precludes the granting of such relief. In Western Sav. Fund Society of Phila. v. SEPTA, 285 Pa. Superior Ct. 187, 427 A.2d 175, 178 (1981) the Court set forth the law:

> "'[I]t is a sound legal principle that unless an option is exercised within the time fixed it necessarily expires: McMillan v. Philadelphia Company, 159 Pa. 142, 28 A. 220

> [(1893)]; Vilsack v. Wilson, 269 Pa. 77, 112 A. 17 [(1920)]; Rhodes v. Good, 271 Pa. 117, 114 A. 494 [(1921)]; Loughey v. Quigley, 279 Pa. 396, 124 A. 84 [(1924)].' Phillips v. Tetzner, 357 Pa. 43, 45, 53 A.2d 129, 131 (1947). This is so because '[t]ime is always of the essence in an option contract.' New Eastwick Corporation v. Philadelphia Builders, 430 Pa. 46, 50, 241 A.2d 766, 769 (1968). Cf. 6 Williston on Contracts § 853 at 212 (3d ed. 1962) ('whether the question arises either at law or in equity it is settled that "time is of the essence of an option".' Id. at 212-13 (footnote omitted))."
> 427 A.2d at 178.

In Western Sav. Fund Society of Phila. the Court accepted arguendo the tenant's contention that Pennsylvania might follow some other jurisdictions in engrafting exceptions onto the rule above stated. The Court noted that where exceptions are permitted and equitable relief is granted, the failure to give timely notice cannot result from the lessee's negligence.

> "The powers of courts of equity may not be arbitrarily exercised to alter terms of a contract understandingly

> made in order to relieve an unfortunate situation, caused solely by the negligent failure of the party seeking relief to observe its requirements."
> 427 A.2d at 180, fn. 5

In Western Sav. Fund Society of Phila., supra. the Court reversed the judgment entered in favor of the lessee, holding that the lessee's own negligence was the cause of its failure to exercise the option timely. Likewise, in the instant case, the testimony of Plaintiff's manager, Michael Haggerty, shows beyond peradventure that Plaintiffs' failure to exercise the option timely resulted from its own negligence.

Thus, under neither of their alternative theories did Plaintiffs show any right to relief, let alone a clear right, and therefore the prerequisite for the granting of a preliminary injunction was not met.

STRASSBURGER, J.

October 15, 1987

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WILLARD C. SHINER and RUTH M. SHINER,

Plaintiffs,

v.

ENCORE ASSOCIATES, INC., a Pennsylvania corporation,

Defendant.

CIVIL DIVISION

No. GD 87-17492

OPINION

Filed by: Wekselman, J.

October 30, 1987

Copies of this Opinion sent to:

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O P I N I O N

Wekselman, J. October 30, 1987

Defendant has filed a notice of appeal from this Court's order entered on October 13, 1987, dismissing its petition for rule to show cause why a confessed judgment in ejectment should not be opened, and this Court, in accordance with the provisions of Rule 1925(a), Pa. R.A.P., now states its reasons for the order appealed from.

Defendant was in possession of a parcel of real estate under a lease from plaintiffs. Plaintiffs contended that the lease had expired and that defendant had no legal basis for continued occupancy. Defendant filed an action in equity at No. GD 87-13567 seeking injunctive relief and filed a motion for preliminary injunction seeking to enjoin the termination of the very lease containing the confession of

judgment in ejectment clause herein under consideration. A hearing was held and Judge Strassburger of this court refused the preliminary injunction. Thereafter, defendant, in effect, sought the same relief by way of a petition for rule to show cause why the confessed judgment in ejectment should not be opened and a stay of proceedings pending the disposition of the rule.

A petitioner for such a rule must show, inter alia, the existence of a colorable defense. This Court concluded that no such defense was shown and for that reason declined to issue the rule. Reference is made to the opinion of Judge Strassburger of this court in connection with the equity matter which is attached hereto, made a part hereof, and marked Appendix A. Judge Strassburger's reasoning in that opinion is persuasive to this Court and it is clear that defendant has offered no proper

defense to the ejectment action. In his opinion, Judge Strassburger states: "Thus, under neither of their alternative theories did Plaintiffs show any right to relief, let alone a clear right, . . ." (Emphasis in original.) That statement applies equally to defendant's failure to show a colorable defense in the matter at bar.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

WILLARD C. SHINER and RUTH M. SHINER,

Plaintiffs,

vs.

ENCORE ASSOCIATES, INC., a Pennsylvania corporation,

Defendant.

CIVIL DIVISION

No. GD 87-17492

OPINION

Ralph H. Smith, Jr., J.

Code: _____

Counsel of Record:

Ronald G. Backer, Esq.

James R. Cooney, Esq.

OPINION

RALPH H. SMITH, JR., J.

The Defendant Encore Associates, Inc., (hereinafter Encore) presented a petition to strike judgment by confession for possession, such judgment having been confessed by plaintiff on October 5, 1987. We denied the petition to strike because of the limitations imposed on this Court by Pa. R.A.P. 1701, and because the merits of the petition itself did not warrant the relief requested.

Limitations of Pa. R.A.P. 1701

Pa. R.A.P. states, "Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court . . . may no longer proceed in the matter." (Emphasis added). On December 17, 1987, when Encore presented the

instant motion, this case had been appealed to the Superior Court. The matter appealed was an order entered by Judge I. Martin Wekselman of this Court on October 13, 1987, denying the defendant's petition to open the very same judgment. Consequently, the record in this matter had already been sent by the Prothonotary to the Superior Court and this Court did not have available to it a record of the judgment defendant sought to have stricken.[1]

We believe Pa. R.A.P. 1701 applies to the present situation and we were thereby prohibited from proceeding in this matter.[2]

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[1]The information regarding the appeal of the October 13, 1987 order of court is taken from Page 1 of defendant's petition to strike and from the Prothonotary's docket.

[2]If defendant had complied with Pa. R.C.P. 2959(a) which states, in part, "Relief from a judgment by confession shall be sought by petition. All grounds for relief, whether to strike off the judgment or to open it, must be asserted in a single petition (emphasis added) . . .," the problem of the absence of a record would not have existed.

Merits of Defendant's Petition

Although it was not necessary to reach the merits of Encore's petition since it could have been denied solely for the reasons cited above, we did consider the petition and found it to be without merit.

It is well-settled that in order to prevail on a petition to strike judgment, a party must show a defect in the judgment which appears on the face of the record. West Chester Plaza Associates v. Chester Engineers, 465 A.2d 1297, 319 Pa. Super. 196 (1983). Where plaintiff has no right to enter judgment, on the face of the record, there is a fatal defect. Polis v. Russell, 161 Pa. Super. 456, 55 A.2d 588 (1947). The fatal defect alleged by Encore is that the plaintiff exercised the warrant of attorney contained in a lease after the expiration of the lease term. Even though Encore

continued to occupy the premises it asserts that it did so without a lease. According to Encore, the expiration of the lease resulted in the demise of the confession of judgment clause contained in the lease. At first blush, this proposition may seem compelling. Indeed, Encore cites cases in which this reasoning was applied. We find, however, that according to current case law and this Court's sense of fairness, a warrant for confession of judgment remains valid after the term set forth in the lease has expired, where the tenant remains in possession.

Encore is attempting to benefit from the lease by recognizing its existence for purposes of its right to occupy the premises (See defendant's petition to strike ¶6); yet, at the same time, relies on the non-existence of the lease in the hope of avoiding the confession of judgment clause contained in the lease. If we accept defendant's reasoning, a warrant for

confession of judgment for possession would virtually never be valid. If a lease is valid and existing, no judgment for possession is appropriate. If, once a lease has terminated, judgment for possession could not be obtained through warrant for confession of judgment, then a warrant for confession of judgment for possession would be meaningless and ineffectual. As the Superior Court stated in Mack v. Fennell, 195 Pa. Super. 501, 171 A.2ds 844 (1961):

> There is no good reason for denying the landlord the right to consider the lease as effective during the period that the tenant treated it as effective by continuing in possession after the notice to quit. . . The law should not permit the tenant, by her own improper act of remaining in possession, to nullify the power of attorney . . . .

See also, Pennsylvania Landlord Remedies: Collection of Rent and Recovery of Possession, 89 Dickinson Law Review 53 (1984).

The prevailing case law and sound reasoning support the conclusion of this Court that the confession of judgment clause was properly exercised by plaintiff in this matter.